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No. _____

In The

Supreme Court of the United States

JOSEPH TURNER, et al.,

Petitioners,

versus

JOHN POULLARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
State of Louisiana

CLIFTON O. BINGHAM, JR.
Deputy Attorney General

ANDRÉ CHARLES CASTAING*
ANNETTE RHODES SENG
Assistant Attorneys General

Louisiana Department of Justice
Litigation Division
P. O. Box 94095
Baton Rouge, LA 70804-9095
(225) 342-8495

Counsel for Petitioners
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is a state law damage claim against state employees arising out of an on-the-job incident a claim "that state officials violated state law in carrying out their official responsibilities" in which the state employees are entitled to the Eleventh Amendment immunity announced in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984)?

PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: Joseph Turner, Lonnie Edmonds, Michael Levatino, Don Thames, and Michael Logan, who were defendants in the district court and appellants in the Court of Appeals.

Respondent: John Poullard, who was the plaintiff in the district court and the appellee in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE SCOPE OF ELEVENTH AMENDMENT IMMUNITY FROM STATE LAW DAMAGE CLAIMS IN FEDERAL COURT AVAILABLE TO STATE EMPLOYEES 7

A. This Court's decision in *Pennhurst* 7

B. The Circuits have interpreted Pennhurst's application to state law damage claims in a variety of inconsistent ways 9

C. Problems with the approaches developed by the Circuits 12

D. This issue goes to the heart of whether a state official is entitled to Eleventh Amendment immunity from state law damage claims in federal court 15

CONCLUSION 16

TABLE OF CONTENTS – Continued

Page

APPENDICES

A. 7 June 1999 unreported opinion of the United States Court of Appeals for the Fifth Circuit in *Poullard v. Turner* (No. 98-30430)..... App. 1

B. 5 April 1998 opinion of the district judge... App. 7

C. 9 September 1997 report of the magistrate judge.....App. 9

TABLE OF AUTHORITIES

Page

CASES

A. SUPREME COURT

Alden v Maine, ___ U.S. ___, 119 S.Ct. 2240, ___ L.Ed.2d ___ (1999) 15

Behrens v. Pelletier, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) 2

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) 7, 8

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908) 7

Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) 14

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ..... *passim*

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) 2, 6, 15

Regents of the University of California v. Doe, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) ..12, 13

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) 8, 15

B. FEDERAL

Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F.3d 87 (2nd Cir. 1998) 10

Catone v. Spielmann, 149 F.3d 156 (2nd Cir. 1998) 10

TABLE OF AUTHORITIES – Continued

Page

Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993), reversed on other grounds, *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) 11

Dover Elevator Co. v. Arkansas State University, 64 F.3d 442 (8th Cir. 1995) 10

Huang v. Board of Governors of the Univ. of North Carolina, 902 F.3d 1134 (4th Cir. 1990) 11

Hughes v. Savell, 902 F.2d 376 (5th Cir. 1990) ... 5, 9, 10

Pena v. Gardner, 976 F.2d 469 (9th Cir. 1992) 11

Suarez Corp. Industries v. McGraw, 125 F.3d 222 (4th Cir. 1997) 11

Turker v. Ohio Department of Rehabilitation and Corrections, 157 F.3d 453 (6th Cir. 1998) 11

Williams v. Commonwealth of Kentucky, 24 F.3d 1526 (6th Cir. 1994), cert. denied, 513 U.S. 947, 115 S.Ct. 358, 130 L.Ed.2d 312 (1994) 11

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992), cert. denied, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993) 10

C. LOUISIANA

Baumeister v. Plunkett, 95-2770 (La. 5/21/96); 673 So.2d 994 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND RULES

A. FEDERAL

U.S. Constitution, Amendment VIII 4

U.S. Constitution, Amendment XI ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1367 ..... 4, 8

42 U.S.C. § 1983 4

Supreme Court Rule 10(a) 7

B. LOUISIANA

La. Civil Code Article 2315 ..... 3, 4, 14

La. Civil Code Article 2320 ..... 3, 6, 12, 14

PETITION FOR WRIT OF CERTIORARI

The petitioners urge that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a decision of the United States District Court for the Middle District of Louisiana. The lower courts denied petitioners' Eleventh Amendment immunity-based motion for summary judgment on respondent's state law claims for monetary damages.

OPINIONS BELOW

The 7 June 1999 opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reprinted at Appendix A to this petition, p. App. 1. The district court's 5 April 1999 opinion adopting the 9 September 1997 report of the magistrate judge (which denied the Eleventh Amendment immunity defense) is unreported and is reprinted at Appendix B to this petition, p. App. 7. The 9 September 1997 report of the magistrate judge is unreported and is reprinted at Appendix C to this petition, p. App. 9.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on 7 June 1999. This Court has jurisdiction under 28 U.S.C. Section 1254(1). The petitioners seek review of the denial by the Court of

Appeals for the Fifth Circuit of their Eleventh Amendment immunity defense.

The Fifth Circuit had jurisdiction over the denial of the petitioners' Eleventh Amendment immunity-based motion for summary judgment under the collateral order doctrine. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S.Ct. 684, 689, 121 L.Ed.2d 605 (1993). The issue presented is a question of law concerning the applicability of this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984) to state law claims for monetary damage against state employees. *See*: *Behrens v. Pelletier*, 516 U.S. 299, 312-14, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996) (holding that where there are issues of law separable from the merits of a claim, a court of appeals has jurisdiction to review those issues of law on interlocutory appeal, even when the district court denied summary judgment on the basis that material disputes of fact remain).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved.

United States Constitution

U.S. Constitution, Eleventh Amendment (1798):

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Louisiana Civil Code

La. Civil Code Article 2315:

Art. 2315. Liability for acts causing damages

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

La. Civil Code Article 2320:

Art. 2320. Acts of servants, students or apprentices

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

The master is answerable for the offenses and *quasi*-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses.*

STATEMENT OF THE CASE

The petitioners[1] were, at all times relevant hereto, employed by the Louisiana Department of Public Safety and Corrections (Department) as Corrections Officers at the Louisiana State Penitentiary (LSP) at Angola, Louisiana.

The respondent is John Poullard, a convicted felon sentenced to the custody of the Department. Respondent is incarcerated at LSP and was incarcerated at LSP at all times relevant hereto.

On 20 June 1994 respondent filed a *pro se* complaint against the petitioners in the United States District Court for the Middle District of Louisiana asserting Eighth Amendment excessive force claims under 42 U.S.C. § 1983. Accordingly, the district court had original jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction). Respondent also invoked the district court's supplemental jurisdiction under 28 U.S.C. § 1367 over battery claims under La. Civil Code Art. 2315 arising out of the same events as his Eighth Amendment claims. Only respondent's Louisiana law battery claims are relevant to this petition.

On 29 April 1994 shortly after lunch, petitioners, while on duty at respondent's housing unit at LSP (Camp J, Unit Cuda-3-Right), were involved in an incident with the respondent where force was used. The respondent alleges that the petitioning corrections officers, while at

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[1] Captain Joseph Turner, Lt. Lonnie Edmonds, Lt. Michael Levatino, Sgt. Don Thames, and Sgt. Michael Logan.

work and on duty, either used force on him for no legitimate reason or failed to intervene while others used force on him.[2] Respondent asserted, *inter alia*, Louisiana law battery claims against the petitioners arising out of that incident.

On 6 March 1995 the petitioners filed an "Answer with Jury Demand and Counterclaim with Jury Demand". In their Answer, the petitioners raised Eleventh Amendment immunity as a defense to respondent's state law claims.

On 22 November 1996 the petitioners filed a "Motion for Summary Judgment on Plaintiff's State Law Claims". Respondent did not challenge the factual assertions made by petitioners in their motion for summary judgment. His only opposition was contained in a motion to strike the petitioners' motion for summary judgment and in a supplement thereto. Respondent asserted that the motion for summary judgment was untimely and that it was legally meritless.

On 9 September 1997 Magistrate Judge Christine Noland entered a Report and Recommendation concerning the petitioners' motion for summary judgment on respondent's state law claims. Appendix C to this petition, p. App. 9. The magistrate judge determined that this court's ruling in *Pennhurst*, as interpreted by the Fifth Circuit in *Hughes v. Savell*, 902 F.2d 376 (5th Cir. 1990), did not apply and that the petitioners were not entitled to

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[2] The petitioners assert that they used necessary force during a cell entry to bring respondent under control.

Eleventh Amendment immunity. Accordingly, she recommended that the motion for summary judgment on respondent's state law claims be denied. On 23 September 1997 the petitioners timely filed an objection to the magistrate judge's report and recommendation. The respondent did not file a response.

In an opinion entered on 6 April 1998, District Judge Frank J. Polozola denied the petitioners' motion for summary judgment "[a]fter independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's Report". Appendix B to this petition, p. App. 7.

On 24 April 1998 the petitioners timely filed a notice of appeal to the Fifth Circuit from the 6 April 1998 ruling denying their Eleventh Amendment immunity-based motion for summary judgment. The Fifth Circuit had jurisdiction over that appeal under the collateral order doctrine. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., id.*

On 7 June 1999 the Fifth Circuit affirmed in an unreported opinion. *John Poullard v. Joseph Turner et al.*, No. 98-30430. Appendix A to this petition, p. App. 1. The Fifth Circuit held that *Pennhurst* did not apply because the corrections officers were not alleged to have acted in the course and scope of their employment within the meaning of La. Civil Code Article 2320 at the time of the alleged attack on respondent.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE SCOPE OF ELEVENTH AMENDMENT IMMUNITY FROM STATE LAW DAMAGE CLAIMS IN FEDERAL COURT AVAILABLE TO STATE EMPLOYEES.

The United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with decisions of several other Courts of Appeals on the same important matter. Supreme Court Rule 10(a). This Court should grant certiorari to resolve this conflict concerning the applicability of the Eleventh Amendment immunity announced in *Pennhurst* to state law damage claims against state employees.

A. This Court's decision in *Pennhurst*.

In *Pennhurst*, this Court reviewed a lower court injunction against Pennsylvania state officials that was based solely upon Pennsylvania state law. This Court reversed, finding that the state law based injunction was barred by the state officials' assertion of Eleventh Amendment immunity. This Court rejected, as inapplicable in a suit against state officials based upon state law, the distinction between prospective (*i.e.*, injunctive) and retroactive (*i.e.*, monetary) relief set forth in cases such as *Ex parte Young*[3] and *Edelman v. Jordan*,[4] stating:

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[3] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908).

[4] 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.
>
> – *Pennhurst*, 465 U.S. at 106, 104 S.Ct. at 911.

This Court then held:

> We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra*, at 908. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.
>
> – *Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919.[5]

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[5] The codification of the jurisprudential rules of pendent jurisdiction in 28 U.S.C. § 1367 does not change this holding. In order for Congress to abrogate the States' Eleventh Amendment immunity, it must first unequivocally express its intent to abrogate the immunity, and second, it must act pursuant to a valid exercise of power. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996). An examination of § 1367 reveals no unequivocal expression of an intent to abrogate the States' Eleventh Amendment immunity.

Accordingly, this Court found that the defendant state officials were entitled to Eleventh Amendment immunity from the state law based injunction.

B. The Circuits have interpreted *Pennhurst's* application to state law damage claims in a variety of inconsistent ways.

Lower federal courts, when faced with state law damage claims against state officials, have applied *Pennhurst's* reasoning in a variety of ways.

1. Course and scope of their employment test.

The Fifth Circuit has held that:

> where litigants accuse state officers of violating state common law when acting in the course and scope of their employment, the Eleventh Amendment prevents the litigant from raising the claim in federal court whether the litigant seeks damages or injunctive relief.
>
> – *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990).

The Fifth Circuit apparently derived its "course and scope of their employment" test from the statement in *Pennhurst* that the Eleventh Amendment bars claims alleging that state officials "violated state law in carrying out their official responsibilities". *Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919. This state law-based "course and scope of their employment" test is often similar to the federal law-based "carrying out their official responsibilities" test announced in *Pennhurst*, but is not always identical to it.

While the Fifth Circuit applied the *Hughes* test in this case, it has not uniformly done so in all cases. For instance, in *Wilson v. UT Health Center*, 973 F.2d 1263, 1271 (5th Cir. 1992), cert. denied, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993), the Fifth Circuit, without citation to *Hughes*, stated: "*Pennhurst* and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities".

2. Official/Individual capacity distinction.

The Eighth Circuit holds that while the Eleventh Amendment bars federal courts from hearing a state law damage claim against state officials sued in their official capacity, state law damage claims against state officials in their individual or personal capacity are not barred. *Dover Elevator Co. v. Arkansas State University*, 64 F.3d 442, 447 (8th Cir. 1995).

3. Inconsistent positions.

The Second, Fourth, Sixth, and Ninth Circuits have each taken contradictory positions.

Second Circuit: Compare: *Catone v. Spielmann*, 149 F.3d 156, 160, fn. 1 (2nd Cir. 1998) (A plaintiff "is barred by the Eleventh Amendment from suing state officials in federal court for a violation of state law".) with *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 102 (2nd Cir. 1998) ("The jurisdictional limitation recognized in *Pennhurst* does not apply to an individual capacity

claim seeking *damages* against a state official, even if the claim is based on state law".).

Fourth Circuit: Compare: *Huang v. Board of Governors of the Univ. of North Carolina*, 902 F.3d 1134, 1138 (4th Cir. 1990) (Plaintiff "concedes that the Eleventh Amendment bars the pendent state monetary damage claims" against the defendant state officials.) with *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 229 (4th Cir. 1997) (The Eleventh Amendment does not bar state law damage claims "against governmental officials sued in their personal capacities".).

Sixth Circuit: Compare: *Turker v. Ohio Department of Rehabilitation and Corrections*, 157 F.3d 453, 457 (6th Cir. 1998) (It is "well-established that a federal court cannot entertain a lawsuit against state officials for violations of state law unless the state has waived its immunity under the Eleventh Amendment", whether the claims are for injunctive relief or for monetary damages.) with *Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1543 (6th Cir. 1994), cert. denied, 513 U.S. 947, 115 S.Ct. 358, 130 L.Ed.2d 312 (1994) ("However, neither the Eleventh Amendment nor *Pennhurst* deprives federal courts of jurisdiction over state law claims for damages against state officials sued in their individual capacities.").

Ninth Circuit: Compare: *Conner v. Sakai*, 15 F.3d 1463, 1471 (9th Cir. 1993), reversed on other grounds, *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) (Plaintiff's claim that Hawaii state law was violated "presents a state law claim, which is barred under *Pennhurst*".) with *Pena v. Gardner*, 976 F.2d 469, 474 (9th

Cir. 1992) ("[T]he eleventh amendment will not bar pendent state claims . . . against state officials acting in their individual capacities.").

C. Problems with the approaches developed by the Circuits.

Neither the "course and scope of their employment" test announced by the Fifth Circuit nor the "official/individual capacity" distinction inconsistently applied by the Circuits is faithful to this Court's holding in *Pennhurst* that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment". *Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919.

1. Course and scope of their employment test.

The Fifth Circuit committed legal error when it found the determinative issue to be whether the State, as the corrections officers' employer, is vicariously liable under Louisiana Civil Code Article 2320 for the alleged torts of the petitioning corrections officers in this case. The Fifth Circuit's reliance upon whether the State of Louisiana would also be liable for the incident under Louisiana tort law ignores this Court's holding in *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) that:

> with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to

> require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.
>
> * * *
>
> Accordingly, we reject respondent's principal contention – that the Eleventh Amendment does not apply to this litigation because any award of damages would be paid by the [United States] Department of Energy, and therefore have no impact upon the treasury of the State of California. The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.
>
> – *Regents*, 519 U.S. at 431, 117 S.Ct. at 904-05.

If a state official's Eleventh Amendment immunity from state law claims announced in *Pennhurst* is dependant on a state law-based course and scope of employment inquiry, the immunity is emasculated. An allegation that the official's conduct was not in the course and scope would suffice to override the protection under that Amendment since resolution of the issue would have to await the resolution of any contested facts. See: *Pennhurst*, 465 U.S. 106, 104 S.Ct. 911.

2. Official/Individual capacity distinction.

Likewise, if the Eleventh Amendment does not bar state law damage claims brought against a state official in his individual capacity, then the immunity conferred by *Pennhurst* is illusory. As this Court has held, the distinction between official and personal capacity suits turns on the capacity in which the official is *sued*, not on the

capacity in which the official *acted* when injuring the plaintiff. *Hafer v. Melo*, 502 U.S. 21, 28, 112 S.Ct. 358, 363, 116 L.Ed.2d 301 (1991). The *Hafer* concept of suing a defendant in a particular capacity (as opposed to the capacity in which the official acted when injuring the plaintiff) does not fit into the *Pennhurst* framework wherein state officials are entitled to Eleventh Amendment immunity from claims that they "violated state law in carrying out their official responsibilities". *Pennhurst* clearly focuses on the official's action, not merely the capacity in which the official is sued.

Under the official/individual capacity distinction, the availability of Eleventh Amendment immunity simply turns on whether the plaintiff remembers to put the phrase "individual capacity" in the complaint. The fundamental principle of Eleventh Amendment immunity is thereby reduced to dependency on a simple pleading device, exalting form over substance.

Further the official/individual capacity distinction improperly imposes federal law onto a claim where substantive state law controls. The official/individual capacity distinction – a creature of federal law – is meaningless under Louisiana law. Under Louisiana Civil Code Article 2315, an individual is liable for his or her own torts without regard to any pleading devices concerning official/individual capacity. Under Louisiana Civil Code Article 2320, an employer is vicariously liable for its employees' torts committed in the course and scope of employment, whether those torts are intentional or

merely negligent,[6] again, without regard to any pleading devices concerning official/individual capacity.

D. This issue goes to the heart of whether a state official is entitled to Eleventh Amendment immunity from state law damage claims in federal court.

The issue presented is the scope of a state official's Eleventh Amendment immunity from state law damage claims in federal court. In *Pennhurst*, this Court held that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment". *Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919. However, as discussed above, the Circuits have failed to develop a coherent and uniform framework for identifying when state officials are in fact being sued for violating state law "in carrying out their official responsibilities" so that Eleventh Amendment immunity applies in a state law claim for monetary damages.

The Eleventh Amendment embodies and recognizes fundamental principles of sovereignty and federalism that underlie our Republic. *Alden v Maine*, ___ U.S. ___, ___, 119 S.Ct. 2240, 2246-47, ___ L.Ed.2d ___ (1999); *Seminole Indian Tribe*, 517 U.S. at 54, 116 S.Ct. at 1122. That immunity confers an immunity from suit, not a mere defense to liability. *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. at 145-46, 113 S.Ct. at 688-89.

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[6] *Baumeister v. Plunkett*, 95-2770, pp. 3-4 (La. 5/21/96); 673 So.2d 994, 996-97.

This Court's ruling in *Pennhurst* holds out to state officials the shield of the Eleventh Amendment to ward off state law damage claims brought against them in federal court. The result of the rulings the Fifth Circuit and other Circuits makes that shield an illusion. As long as *Pennhurst* is good law, attorneys representing state officials have a duty to raise the Eleventh Amendment immunity defense to state law damage claims filed in federal court. If that immunity is in fact a chimera, this Court should so state. Clarifying this issue will serve both judicial efficiency and judicial economy.

This Court should grant this writ and clarify under which of the following circumstances state officials sued in federal court for state law damage claims are entitled to the Eleventh Amendment immunity announced in *Pennhurst*:

- in all state law damage claims brought against them arising out of their official responsibilities;
- only in state law damage claims for violating state common law when acting in the course and scope of their employment; or
- only in state law damage claims brought against them in their official capacities.

CONCLUSION

This Court should grant a writ of certiorari and decide whether state officials sued in federal court for state law damage claims arising out of an on-the-job

incident are entitled to the Eleventh Amendment immunity announced in *Pennhurst*.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
State of Louisiana

CLIFTON O. BINGHAM, JR.
Deputy Attorney General

ANDRÉ CHARLES CASTAING*
ANNETTE RHODES SENG
Assistant Attorneys General

Louisiana Department of Justice
Litigation Division
P. O. Box 94095
Baton Rouge, LA 70804-9095
(225) 342-8495

Counsel for Petitioners

* *Counsel of Record*

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-30430

JOHN POULLARD,

Plaintiff-Appellee,

versus

JOSEPH TURNER, Captain; LONNIE EDMONDS, Lieutenant; MICHAEL LEVATINO, Lieutenant; DON THAMES, Sergeant; and MICHAEL LOGAN, Sergeant,

Defendants-Appellants.

Appeal from the United States District Court
For the Middle District of Louisiana
(94-CV-777)

(Filed Jun. 07, 1999)

Before REAVLEY, JOLLY and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

Joseph Turner, Lonnie Edmonds, Michael Levatino, Don Thames, and Michael Logan ("the defendants"),

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

appeal the denial of their motion for summary judgment asserting Eleventh Amendment immunity. We affirm.

John Poullard, a Louisiana inmate, filed suit against the defendants, all of whom are Louisiana correctional officers, in their "[i]ndividual and [p]ersonal" capacities. He alleged that Turner, Edwards, and Levatino beat him in retaliation for lawsuits that he was prosecuting, and that Thames and Logan failed to stop the beating. Based on his allegations, Poullard asserted that the defendants had transgressed the Eighth Amendment's prohibition against cruel and unusual punishment, and had committed the intentional tort of battery, in violation of state law.[1]

The defendants filed a motion for summary judgment on the battery claim.[2] The Magistrate Judge, to whom the district court had referred all pretrial matters, recommended denial of the motion. The defendants objected.

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[1] Under Louisiana law, a battery is "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact." *Caudle v. Betts*, 512 So.2d 389, 391 (La. 1987).

[2] The defendants filed a "Statement of Undisputed Facts" in support of their motion for summary judgment. *See* M.D. LA. R. 2.09 (1996). The Statement recited that Pollard was a Louisiana inmate and that each of the defendants was an employee of the Louisiana Department of Public Safety and Corrections. Because Poullard did not object, the facts in the Statement were deemed admitted. *See* M.D. LA. R. 2.10 (1996). Besides the Statement, the Magistrate Judge examined the allegations in Poullard's complaint in reviewing the motion for summary judgment. On appeal, the defendants also point to the pretrial orders, which respectively lay out each side's version of events.

The district court overruled the objection, and denied the motion for summary judgment. The defendants timely appealed.[3]

We review the district court's refusal to grant the defendants Eleventh Amendment immunity *de novo*.[4] *See Ussery v. Louisiana ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 434 (5th Cir. 1998), *cert. dismissed*, ___ U.S. ___, 119 S. Ct. 1161, ___ L. Ed. 2d ___ (1999). The Eleventh Amendment bars suits in federal court against state officials where the state is the real, substantial party in interest. *See Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990). The state is the real party in interest if the decision rendered in a case will operate against the sovereign, expending itself on the public treasury, interfering with

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[3] The defendants' appeal concerns a non-final decision. The collateral order doctrine provides us with jurisdiction to hear their appeal. *See Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999) (appeal of non-final decision on Eleventh Amendment immunity).

[4] We have characterized Eleventh Amendment immunity as an issue of subject-matter jurisdiction. *See United States v. Texas Tech Univ.*, 171 F.3d 279, 286 n.9 (5th Cir. 1999). Consequently, we have held that a motion to dismiss for lack of subject-matter jurisdiction, not a motion for summary judgment, is the proper vehicle for raising an Eleventh Amendment defense. *See Voison's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-89 (5th Cir. 1986). The defendants have failed to heed this holding in raising their Eleventh Amendment defense in a summary judgment motion. This mistake causes no difficulty. We, like the Magistrate Judge and district court apparently did, treat the motion for summary judgment as a motion to dismiss for lack of subject-matter jurisdiction based on the complaint's allegations and the undisputed facts. *See id.* at 188 n.5.

public administration, or compelling the state to act or refrain from acting. *See id.* at 378. Under this reasoning, a claim that a state official violated state law in carrying out his official responsibilities is a claim against the state. *See id.* Therefore, when a plaintiff accuses a state official of violating state common law when acting in the acting in the course and scope of their employment, the Eleventh Amendment prevents him from raising the claim in federal court regardless of whether he seeks damages or injunctive relief, and regardless of whether he invokes the court's original or supplemental jurisdiction. *See id.* We look to state law to determine if a state official's conduct is within the course and scope of his employment. *See id.* at 379; *Goss v. San Jacinto Junior College*, 588 F.2d 96, 98 (5th Cir. 1979).

The defendants argue that the Eleventh Amendment bars Poullard's battery claim because Poullard alleges that they violated state common law when acting in the course and scope of their employment. In support of their contention, they point to Louisiana's rule of vicarious liability, which provides that "an employer is liable for a tort committed by his employee if, at the time, the employee was acting within the course and scope of his employment." *Baumeister v. Plunkett*, 673 So.2d 994, 996 (La. 1996); *see* LA. CIV. CODE art. 2320 (West 1997) ("Masters and employers are answerable for damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.").[5] Certain conditions must prevail for this rule to apply:

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[5] Article 2320 has remained unchanged throughout the period during which this case has been litigated. *See* LA. CIV.

> [I]n order for an employer to be vicariously liable for the tortious acts of its employee the "tortious conduct of the [employee must be] so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interest."

Baumeister, 673 So.2d at 996. Therefore, vicarious liability attaches only if the employee commits an intentional tort (1) on business premises (2) during work hours (3) while acting within the ambit of his assigned duties and (4) in furtherance of his employer's objective. *See id.; see also LeBrane v. Lewis,* 292 So.2d 216, 218 (La. 1974) (identifying factors relevant to determining if an employer is vicariously liable for his employee's violent act).

We find that Poullard does not plead facts that show the defendants' conduct to have occurred while the defendants were acting in the course and scope of their employment. The defendants' alleged conduct does not implicate Louisiana's rule of vicarious liability. Neither beating an inmate in retaliation for litigiousness nor allowing such an attack to occur comes within the scope of a correctional officer's assigned duties or furthers the state's penological objectives.[6] *See Baumeister,* 673 So.2d at 997-98 (reviewing cases deciding whether or not an

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Code Ann. art. 2320 (West 1997) (Historical and Statutory Notes).

[6] We offer no opinion on whether or not Poullard has pled facts sufficient to state a battery claim, a completely different matter.

employer was vicariously liable for its employee's violent conduct). We therefore reject the defendants' contention that the Eleventh Amendment bars Poullard's battery claim because they were acting in the course and scope of their employment.[7]

The district court correctly held that the Eleventh Amendment does not bar Poullard's battery claim. Accordingly, we affirm the denial of the defendants' motion for summary judgment, and remand this case for further proceedings.

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[7] The defendants also argue that the fact that the state is not obliged under Louisiana law to indemnify them does not strip them of the protection of the Eleventh Amendment. *See* LA. REV. STAT. ANN. § 13:5108.2(A)-(B) (West 1991) (denying indemnification for intentional tortfeasors). In their view, the state being vicariously liable for their conduct dictates that they receive Eleventh Amendment immunity. That it does not also indemnify them is irrelevant. As we conclude that the state is not vicariously liable in this case, we need not decide how the lack of indemnification affects the availability of Eleventh Amendment immunity.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN POULLARD

CIVIL ACTION

VERSUS

NO. 94-777-B-M2

JOSEPH TURNER, ET AL

OPINION

(Filed April 6, 1998)

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's Report to which an objection was filed:

IT IS ORDERED that the defendants' supplemental motion for summary judgment be DENIED.

IT IS FURTHER ORDERED that this matter be referred back to the Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, April 5, 1998.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JOHN POULLARD

CIVIL ACTION

VERSUS

NO. 94-0777-B-M2

JOSEPH TURNER, ET AL

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten (10) days after being served with the attached Report to file written objections to the proposed findings of fact, conclusions of law and recommendations therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 10 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge which have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, this 9 day of September, 1997.

/s/ Christine Noland
CHRISTINE NOLAND
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN POULLARD	**CIVIL ACTION**
VERSUS	(Filed Sep. 9, 1997)
JOSEPH TURNER, ET AL.	**NO. 94-0777-B-M2**

SUPPLEMENTAL MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the Court on the defendants' supplemental motion for summary judgment, rec.doc.no. 78. This motion is opposed.

Pro se plaintiff, an inmate incarcerated at the Louisiana State Penitentiary ("LSP"), Angola, Louisiana, brought this action pursuant to 42 U.S.C. § 1983 and state law against Captain Joseph Turner, Lt. Lonnie Edmonds, Lt. Michael Levatino, Sgt. Don Thames and Sgt. Michael Logan. The plaintiff alleges that the defendants violated his constitutional rights on April 29, 1994, when they subjected him to excessive force in retaliation for having filed lawsuits and prison grievance procedures against security officers. The defendants have asserted a counter-claim against the plaintiff seeking monetary damages based upon allegations of state law assault and battery.[1]

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[1] In the referenced counter-claim, the defendants also asserted claims based upon allegations of defamation and intentional infliction of emotional distress by plaintiff. With regard to the former, the defendants voluntarily dismissed same as premature, and with regard to the latter, the Court dismissed same upon the defendants' concession, in pleadings before the Court, that this claim was premature.

Pursuant to earlier Magistrate's Report in this case, approved by the District Judge on May 30, 1997; rec.doc.nos. 68 & 104, the Court has dismissed the plaintiff's claims against the defendants in their official capacities and dismissed that part of the defendants' counterclaim which seeks relief against the plaintiff for intentional infliction of emotional distress under state law. *See* note 1, *supra.*

The defendants now again move for summary judgment, solely in connection with the plaintiff's state law claims against them. The basis for the defendants' motion is their contention that the Eleventh Amendment to the United States Constitution bars a state law tort action by the plaintiff against state officials in federal court. *See Hughes v. Savell,* 902 F.2d 376 (5th Cir. 1990).

The plaintiff's Complaint alleges that on the morning of April 29, 1994, defendants Edmonds, Levatino and Turner came to his cell and administered a brutal beating after the plaintiff refused to drop a pending lawsuit and administrative grievance procedure which he had filed against them. In addition, the defendants charged him with false and retaliatory disciplinary reports for "property destruction", "defiance" and "aggravated disobedience". Defendant Thames was allegedly present but failed to intervene or prevent the attack, and defendant Logan thereafter drove the plaintiff to the prison hospital and failed to intervene or prevent defendant Admonds from continuing to beat the plaintiff en route. After this incident, the plaintiff was transported by ambulance to Earl K. Long Hospital where x-rays revealed that he had sustained broken bones in both legs.

Under the Eleventh Amendment to the United States Constitution, an unconsenting state is immune from suits seeking monetary damages or equitable relief brought in federal courts by her own citizens as well as citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Although Congress has the power to abrogate this immunity through the Fourteenth Amendment, it has not done so as to claims for deprivation of civil rights under color of state law. *See Quern v. Jordan,* 440 U.S 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Edelman v. Jordan, supra.* Accordingly, inasmuch as Louisiana has not waived her sovereign immunity under the Eleventh Amendment, she is immune from suit in this action.

In *Hughes v. Savell,* 902 F.2d 376 (5th Cir. 1990), the Fifth Circuit Court of Appeals addressed a claim of negligence brought by an inmate against a prison security officer. In concluding that such a claim would not be allowed to proceed in federal court, the Court emphasized that where a decision would "operate against the sovereign" or "[expend] itself on the public treasury", such an action is effectively one against the state:

> The state is the real party in interest if the decision rendered in a case would operate against the sovereign, expending itself on the public treasury, interfering with public administration, or compelling the state to act or to refrain from acting. [*Citing Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)].

The defendants contend that this principle applies in the instant case to preclude the plaintiff's claims against the defendant prison officials. The *Hughes* case, however, dealt only with a claim of negligence, and the Court noted therein that "[where] Louisiana's statutes . . . require . . . indemnification", such a claim " 'is really a suit against the state', barred by the Eleventh Amendment". *Id.*, at note 5. The Court did not address the issue presented herein, whether a claim of intentional tort against a prison security officer is similarly barred. This issue was subsequently addressed by the Fifth Circuit in *Flowers v. Phelps*, 956 F.2d 488 (5th Cir. 1992), *vacated in part*, 964 F.2d 400 (5th Cir. 1992), wherein the Court distinguished *Hughes* and concluded that a claim of *intentional* tort asserted against a state employee in his individual capacity was not barred by Eleventh Amendment immunity. The basis for this distinction was the Louisiana statutory provision which excluded from respondeat superior liability employees who commit intentional or grossly negligent acts. *See* La. R.S. 13:5108.1(A) and 13:5108.2(B). Although that part of the *Flowers* decision which addressed the Eleventh Amendment immunity issue was subsequently vacated, in part, upon rehearing (upon that Court's determination that it need not reach this issue), this Court finds the reasoning of the *Flowers* Court persuasive:

> Louisiana's indemnity statute does not obligate the state to pay damages awarded for intentional acts committed by its employees. [Plaintiff] alleged that the defendants intentionally beat and kicked him, an allegation which the district court found to be true. Because the state statute does not mandate indemnification in this

> case, the Eleventh Amendment does not bar [plaintiff's] tort claim.

Accordingly, for the reasons expressed in *Flowers*, this Court concludes that the plaintiff's claims of intentional tort against the state-employed defendants are not barred by the Eleventh Amendment in this case.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that the defendants' supplemental motion for summary judgment be DENIED, and that this matter be referred back to the Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, this 9 day of September, 1997.

/s/ Christine Noland
CHRISTINE NOLAND
MAGISTRATE JUDGE